No. 76-1437

In the Supreme Court of the United States

OCTOBER TERM, 1976

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO, PETITIONER

v.

CARRIER AIR CONDITIONING COMPANY AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1437

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28, AFL-CIO, PETITIONER

v.

CARRIER AIR CONDITIONING COMPANY AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-30a) is reported at 547 F. 2d 1178. The opinion of the National Labor Relations Board (Pet. App. 31a-44a) is reported at 222 NLRB 727. The recommended decision of the Administrative Law Judge (Carrier Br. in Opp. App. 1a-42a) is reported at 222 NLRB 731.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1977. The petition for a writ of certiorari was filed on April 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals should have remanded this case to the Board to allow the Board to determine, in the first instance, whether the collective bargaining agreement provisions involved here had a primary work preservation purpose.

2. Whether a union may enforce a no-subcontracting clause by referring disputes to arbitration and by asking for compensation for breach of that clause.

STATEMENT

1. The collective bargaining agreement between petitioner Sheet Metal Workers' International Association, Local 28, AFL-CIO ("the Union") and the Sheet Metal and Air Conditioning Contractors National Association, New York Chapter, Inc., contains a no-subcontracting clause (Pet. App. 6a n. 3). The Union invoked this clause to bar the installation of Carrier Air Conditioning Company's "Moduline" air conditioning units, which contained prefabricated plenums.

Carrier argued that the clause operated as a prohibited secondary agreement. The Board's Administrative Law Judge found that the application of the no-subcontracting clause to the Moduline units violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), which prohibits "hot cargo" or secondary agreements (Carrier Br. in Opp. App. 32a-38a). He concluded that attaching the plenums to those units was "new" work rather than work traditionally performed by the employees covered by the contract, and hence the Union's objective was work acquisition rather than work preservation (*id.* at 34a-36a).[1]

[1]The Administrative Law Judge also relied on the fact that the Association lacked the "right to control" the use of the Moduline units (Carrier Br. in Opp. App. 34a).

He also found that the Union violated Section 8(b)(4)(i)(B) of the Act, 29 U.S.C. 158(b)(4)(i)(B), by inducing employees to refuse to perform services, and Section 8(b)(4)(ii)(B), 29 U.S.C. 158(b)(4)(ii)(B), by restraining and coercing employees, in furtherance of the Union's unlawful secondary objective (Carrier Br. in Opp. App. 38a-40a).

The Board dismissed the unfair labor practice complaint in its entirety (Pet. App. 31a(1)-44a).[2]

The Board found that Carrier had not established a threshold requirement—the Union's use of illegal inducement or coercion. It therefore did not consider whether the Union had an unlawful secondary objective. The Board found that the Union had not engaged in the inducement or encouragement proscribed by Section 8(b)(4)(i)(B) by presenting to its membership a resolution recommending that the no-subcontracting clause not be waived for Carrier plenums, or by the action of one union member in erasing Carrier units from the sketches for one project (Pet. App. 40a(2)-41a(1), 42a(1), 43a(1)). The Board further found that the Union had not engaged in restraint or coercion, within the meaning of Section 8(b)(4)(ii)(B), or violated Section 8(e), by telling Carrier representatives that Moduline units would not be allowed into New York City, or by invoking the contractual grievance procedure against a subcontractor that installed Moduline units.[3] The Board found that the

[2]The petition contains several pages bearing the same page number. We have designated the first page 31a as 31a(1), the second page 31a as 31a(2), and so on.

[3]Rule XIX of the contract provides that the penalty for the first violation of the agreement shall be censure, and that for subsequent violations a fine shall be imposed commensurate with the loss adjudged by the Joint Adjustment Board to have been sustained by journeymen sheet metal workers by reason of such violation (Pet. App. 34a(2)-35a(1)). The Joint Adjustment Board consists of an equal number of representatives of the Union and of the Employer Association (Pet. App. 40a(2) n. 6).

"statements were no more than reiteration of [the Union's] position that it would not relinquish its rights under the collective bargaining agreement" (Pet. App. 41a(1)-41a(2)), and that the situation as a whole came within the rule of *Southern California Pipe Trades District Council No. 16 (Associated General Contractors of California)*, 207 NLRB 698, 700,[4] that a "contractual agreement * * * for compensation of a breach of contract determined by contractually fair procedures is a reasonable and peaceful method of resolving a dispute," and thus does "not constitute statutorily proscribed threats, coercion, or restraint" (Pet. App. 42a(1)). Because the Board concluded that the resort to contractual grievance machinery did not amount to threats or coercion, it "[found] it unnecessary to reach the primary-secondary employer and work preservation issues on which the Administrative Law Judge passed" (*id.* at 43a(2); see also *id.* at 41a(2) n. 8).

2. The court of appeals agreed with the Board that the Union had not violated Section 8(b)(4)(i)(B) of the Act (Pet. App. 22a, 27a, 24a),[5] but it disagreed with the Board's application of Section 8(b)(4)(ii)(B) and Section 8(e) to this case (*id.* at 12a-29a). The court, reaching an issue pretermitted by the Board, held that the no-subcontracting clause, as applied by the Union to the fabrication and installation of plenums on Carrier Moduline units, had a work acquisition objective that was secondary and

[4]Reversed *sub nom. Associated General Contractors of California* v. *National Labor Relations Board*, 514 F. 2d 433 (C.A. 9).

[5]Pet. App. 23a and 27a are printed out of order. Page 23a should be substituted for page 27a, and *vice versa*.

proscribed by Section 8(e);[6] the court reasoned that the fabrication and installation of the Moduline plenums was new work, not work traditionally performed by the employees covered by the contract (Pet. App. 12a-19a).[7]

The court further concluded that the Union's warnings that the Moduline units would not be allowed into New York City, and its invocation of the contractual enforcement mechanism, constituted threats, coercion, or restraint for a secondary purpose and consequently were prohibited by Section 8(b)(4)(ii)(B) (Pet. App. 23a-26a, 28a-29a). Although it acknowledged that resort to the courts for enforcement of a contract provision is not the sort of coercion that Congress intended to make unlawful, the court held that resort to the contract enforcement procedures here was coercive because the grievance and

[6]The court held that the Section 8(e) charge was not barred by the six-month limitations period of Section 10(b) of the Act, 29 U.S.C. 160(b), finding, contrary to the Board (Pet. App. 42a(2) n. 10), that the Union and the Association had, within the six-month period, reaffirmed the applicability of the no-subcontracting clause to the Carrier Moduline units (Pet. App. 14a-16a and n. 8).

[7]The court rejected the Board's contention that a remand was required (Pet. App. 17a n. 9). The court found that "the Board did reach the [work preservation and secondary activity] questions, albeit implicitly, and that in any event * * * a remand would serve no purpose" (*ibid.*). The court added: "The ALJ's findings of fact, which were essentially accepted by the Board, show a pattern of secondary activity and a purpose other than work preservation, which he found more than sufficient for §8(e) purposes, a conclusion with which we agree" (*ibid.*).

The court also observed that "[b]ecause we find ample direct evidence of the no-subcontracting clause's secondary purpose, unrelated to work preservation, we need not consider whether such a purpose may be inferred on the basis that the Association members lacked the 'right to control' the work sought by the Union" (Pet. App. 19a n. 12). See note 1, *supra*, and *National Labor Relations Board* v. *Enterprise Association*, No. 75-777, decided February 22, 1977.

arbitration provisions were not judicial and lacked the "factors that give true arbitration some resemblance to a court proceeding, particularly the presence of a neutral factfinder with no stake in the outcome of the dispute" (Pet. App. 28a).[8] The court remanded the case to the Board "for proceedings not inconsistent with this opinion" (Pet. App. 29a).

Judge Smith agreed with the majority that the Board erred in finding lack of coercion. He, however, would have remanded the case to the Board to allow it to consider whether the Union's objective was work preservation or work acquisition (Pet. App. 29a-30a).

DISCUSSION

The Board does not agree with the court of appeals' disposition of this case. It believes that the court of appeals should have remanded the case to the Board to allow the Board to decide, in the first instance, whether the activity in question was "work acquisition" rather than "work preservation." The difference is important (cf. *National Labor Relations Board* v. *Enterprise Association*, No. 75-777, decided February 22, 1977, slip op. 22 n. 16), and the task of drawing inferences from the facts in each case is for the Board rather than for the courts. The court of appeals therefore should not have passed upon this question, or upon the question whether the Union's object was primary or secondary, without receiving the views of the Board. *South Prairie Construction Co.* v. *Local No. 627, Operating Engineers*, 425 U.S. 800, 805-806; *National Labor Relations Board* v. *Food Store Employees*, 417 U.S. 1, 9.

---

[8] The court added: "We need not decide whether resort to bona fide arbitration procedures would constitute unlawful coercion" (Pet. App. 27a).

The Board also believes that the resort to contractual grievance machinery is not the sort of pressure or coercion prohibited by Sections 8(b)(4)(ii)(B) and 8(e) of the Act, and that the court of appeals erred in reaching a contrary conclusion. The Union activity at issue here was, the Board concluded, permissible whether or not it had a prohibited secondary objective. See H.R. Rep. No. 1147, 86th Cong., 1st Sess. 39-40 (1959).

Nevertheless, the Board did not file a petition for a writ of certiorari because the court of appeals' decision turns essentially upon an evaluation of the peculiar circumstances of this case. The Board does not believe that the court of appeals' decision will have an impact on a substantial number of other cases. In the absence of a conflict among the circuits on the question presented here, review by this Court is not necessary.[9] If the Court grants the Union's petition for a writ

---

[9] Contrary to petitioner's suggestion (Pet. 19-21), the legal standard applied by the Second Circuit here is compatible with that applied by the Board and the District of Columbia Circuit in evaluating work preservation issues under *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612. The courts agree that Section 8(e) permits contract provisions aimed at the protection of work traditionally performed by unit employees and proscribes contract provisions designed to acquire work not traditionally performed by them. Compare Pet. App. 18a-19a with *Plumbers and Steamfitters, Local Union 342 (Conduit Fabricators)*, 225 NLRB No. 195; *Building Material & Construction Teamsters* v. *National Labor Relations Board*, 520 F. 2d 172, 178-179 (C.A. D.C.). See also *National Labor Relations Board* v. *Enterprise Association*, *supra*, slip op. 22 n. 16.

Petitioner contends (Pet. 25-26) that the court of appeals' decision conflicts with *George Koch Sons, Inc.* v. *National Labor Relations Board*, 490 F. 2d 323, 327 (C.A. 4). But *Koch*, like *Enterprise Association*, involved the Board's "right to control" doctrine. The court in *Koch* enforced a Board order finding secondary activity, and it had no occasion to consider whether resort to contractual grievance procedures constituted the pressure or coercion forbidden by the Act when pursued with a secondary objective.

of certiorari, however, the Board is prepared to defend its decision on the merits.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board.

JUNE 1977.